HR-86-030-GB
1-1700-718-2
DHR - E10187

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by
Jayne B. Khalifa, Acting Commissioner,
-Department of Human Rights,

Complainant,

FINDINGS OF FACT,

CONCLUSIONS AND ORDER

vs

Hennepin County.

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck at 9:00 A.M. on April 16, 1987 in Courtroom No. 12, Third Floor, Summit Bank Building, in the City of Minneapolis, Minnesota. The hearing continued on the following day, April 17, 1987, and was completed on May 18, 1987.

Nancy J Leppink, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Complainant, the Acting Commissioner of the Minnesota Department of Human Rights. Janeen E. Rosas, Assistant County Attorney, 2000 Government Center, Minneapolis, Minnesota 55487, appeared on behalf of the Respondent, Hennepin County.

The record closed on July 24, 1987, the date of receipt by the Administrative Law Judge of the final post-hearing submission.

NOTICE

Pursuant to Minn. Stat. 363.071, subd. 2, this order is the final decision in this case and under Minn. Stat. 363.072, the Commissioner of the

Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. 14.63 through 14.69.

STATEMENT OF ISSUES

The issues to be determined in this contested case proceeding are whether or not the Respondent unlawfully discriminated against the Charging Party, Mark R. Barta because of his disability, or whether the Charging Party would pose a serious threat to the health or safety of himself or others, and/or whether the refusal to hire was based upon a bona fide occupational

qualification, and, if unlawful discrimination occurred, what damages should be awarded.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Charging Party's Education and Work History.

1. Mark Roy Barta, the Charging Party, is currently 25 years of age and resides in Rochester, Minnesota. Upon graduation from high school in 1980, Mr. Barta entered college at the University of Wisconsin at Eau Claire where he majored in criminal justice. (Tr. 20). In January of 1983 he transferred to the University of Wisconsin at Platteville where he graduated with a Bachelor's Degree in December of 1984. (Tr. 22).

2. During the summer of 1982 Mr. Barta was employed as a mover for Allied Van Lines and as a swimming pool supervisor. (Tr. 30). In August of 1982 he was involved in a serious automobile accident in which he sustained spinal injuries. (Tr. 31). He was thrown from the automobile in the course of the accident and remained unconscious or semi-conscious for several hours until found. (Tr. 1OO). He was hospitalized in Rochester for approximately 100 days. (Ex. CC, p. 25). Subsequent to the accident and to the date of the hearing, Mr. Barta has engaged in sports such as golf, tennis , downhill skiing, horse riding and touch football . (Tr. 33). He has also worked on his parents' farm, including baling hay, taking care of horses, driving a tractor and other machinery. (Tr. 32-33).

3. Mr. Barta's work history includes volunteer service as a counselor-intern in a halfway house in Rochester where he counselled residents, prepared daily reports and attended staff meetings from June to July of 1983. From June of 1983 to August of 1983 Mr. Barta also served as a jail monitor at the Olmsted County jail where he was responsible for booking

inmates, searches and general supervision of inmates. (Tr. 26). The jail has a capacity of 70 inmates and employs four or five correctional officers per shift. (Tr. 99-100). Mr. Barta worked approximately 8 to 10 hours per week as a jail monitor for 10 to 12 weeks at a compensation of $3.50 per hour. (Tr. 92). In January of 1985, Mr. Barta resumed employment as a jail monitor with Olmsted County and continued in this position through March of 1985, although he was also on-call for that job in April and May of 1985. (Tr. 35). During this time period Mr. Barta worked less than 8 to 10 hours per week at $3.50 to $4.00 per hour. (Tr. 93).

4. In April of 1985 Mr. Barta became employed in a full-time temporary position as a probation officer in Olmsted County. In this job he saw people who were on probation through weekly contact, and made pre-sentence recommendations to the court. In this position he was paid $5.00 per hour for a 40-hour week but received no benefits. (Tr. 93). In May of 1985 he left this position when the person holding the full-time permanent job returned to work.

5 On June 16, 1985 Mr. Barta became employed as a chemical dependency counselor with the Olmsted County Department of Social Services. He remained employed in this position to the date of the hearing. He was compensated at the rate of $8.30 per hour when he began this position and after three months received full benefits such as medical, dental, vacation and sick leave. (Tr. 94). In this Job Mr. Barta interviews approximately 70 new clients per month who have been convicted of driving while intoxicated, and makes pre-sentence reports to the court concerning these misdemeanants. (Tr. 38). He has been paid at $9.76 per hour since January 1, 1987. (Tr. 150).

6. During calendar year 1985 Mr. Barta received gross wages of $9,597.99 from Olmsted County. (Ex. M; Ex. N). During calendar year 1986 Mr. Barta received gross wages of $18,981.70 from his employer, Olmsted County. (Ex. P). Mr. Barta's most recent pay check stub, for the pay period ending march 30, 1987, shows that he is compensated at the rate of $9.79 per hour and receives $783.20 for each two-week period. (Ex. 0).

The Job Application Process.

7. Sometime prior to October of 1984, Mr. Barta filled out a job title card with the Hennepin County Personnel_Department and indicated on it that he was interested in any job openings for the position of Correctional Officer. (Tr. 39). On October 15, 1984 he received a postcard from Hennepin County advising him that applications for Correctional Officer would be accepted at the Personnel Department beginning cm October in 1984 and ending on October 1 8, 1 984. (Ex. A). Mr. Barta mailed a written application to the Hennepin County Personnel Department.

8. Mr. Barta received it letter dated October 23, 1984 from Hennepin County inviting him to participate in an oral examination for the position of Correctional Officer which was scheduled for Tuesday, October 30, 1984. (Ex. B). Mr. Barta appeared for the panel interview during which he was asked a

number of questions about how he would handle various situations relating to the position of Correctional Officer. He was not asked any questions concerning his physical ability. (Tr. 45). During the course of the interview to was asked to sign a release form so that Hennepin County could gain information relating to his employment history, driving record, medical background, academic background and criminal history background. (Ex. C) . Subsequent to the oral interview, Mr. Barta also received a notice to appear for a Minnesota Multiphasic Personality Inventory test which he attended and completed. (Tr. 46).

9. John Skavnak, manager of the men's section of the Hennepin County Adult Corrections Facility (ACF), received a certification list from the Hennepin County Personnel Department dated December 13, 1984 in response to his request to fill two intermittent Correctional Officer positions. An intermittent position is one in which the employee is "on-call" but is not full time and has no benefits beyond the hourly wage. There were 12 names listed on the certification report including Mark Barta, Michael Conery, Guy Hanson and Paul Schanno. (Ex. S). Mr. Skavnak hired Mr. Schanno effective December 31 , 1984 and Mr. Hanson effective December 26, 1984 for the two intermittent positions.

10. Mr. Skavnak then decided to also fill a temporary full-time position from the intermittent list. Temporary positions do not need to be hired from a list. (Tr. 301). He was seeking to hire a temporary full-time position due to two retirements at the end of 1984 which had created Correctional Officer vacancies. Temporary full-time positions are often used in the case of promotions, retirements, deaths or extended illnesses. (Tr. 328). Temporary full-time employment is not necessarily related to permanent employment although some temporary full-time employees -do go on to become permanent full-time employees. (Tr. 335). Generally, if a temporary full-time correctional officer performs well, it will aid his or her selection for a permanent position. (Tr. 335). If the temporary performance is not adequate, however, it will work against an applicant for a full-time permanent position. (Tr. 337). One cannot transfer from a temporary to a permanent position, but must be reconsidered for employment. (Tr. 465).

11. Sometime in mid-December of 1984 Mr. Barta received a card from Hennepin County which indicated that he had scored 75.15 and was 21st on the list for the position of Correctional Officer. (Tr. 48). Approximately two days later, on December 20, 1984, Mr. Barta received a telephone call from John Skavnak, who asked Mr. Barta if he would like to interview for a full-time temporary position as a Correctional Officer at ACF. Mr. SkavraK, who is the supervisor of the mens section of ACF, has been employed at ACF for 17 years and has worked as a Correctional Officer. Mr. Barta did appear for an interview with Mr. Skavnak at ACF during which Mr. Skavnak asked a number of hypothetical questions. (Tr. 49). There were no questions related to Mr. Barta's physical health or physical ability (Tr. 50) nor did Mr. Skavnak ask Mr. Barta to demonstrate any physical ability. (Tr. 288). Mr. Skavnak indicated at the interview that he had a number of full-time temporary positions which would last approximately six months and indicated that,

although he had more interviews to complete, he would likely be able to offer one to Mr. Barta. (Tr. 52).

12. Subsequent to this interview Mr. Skavnak called Mr. Barta and offered him employment as -a temporary full-time Correctional Officer for a period of six months beginning January 9, 1985. He was to work the 3:00 P.M. to 11:00 P.M. shift and to be paid at a rate of $9.06 per hour. (Tr. 54). Mr. Barta accepted the offer. (Tr. 55). Mr. Skavnak indicated that he could not guarantee that Mr. Barta would later be offered a full-time permanent position but that often people worked into that position from a temporary position. (Tr. 54). Mr. Skavnak called Mr. Barta again later the same day and advised him that he would need to have a pre-employment physical at the Park Nicollet Medical Center and that it had been scheduled for December 28, 1984. (Tr. 55).

13. Upon arrival at the Medical Center on December 28, Mr. Barta was asked to fill out a health history form. (Ex. 30, p. 8; Ex. D) . On it, he disclosed that he suffered injuries due to a broken back and neck in an automobile accident on August 5, 1982 when he was 20. years <Ad. He indicated that he was hospitalized from August 5 through November 16 of 1982 at St. Mary's Hospital in Rochester. He stated that during the accident he also suffered a broken arm, ribs, and a punctured lung. He stated that his current physical complaints or disabilities included muscle weakness in the left leg for which he wears a brace. (Ex. D). Before tie saw the physician, Mr.

Barta's temperature, pulse and blood pressure were taken, he was given a TB test and blood samples were taken. (Tr. 60). Mr. Barta was then examined by Dr. Robert MacCornack. Dv% MacCornack specializes in occupational medicine, is a Board certified surgeon, and has evaluated applicants for positions at ACF for at least 10 years. (Ex. 30, pp. 1, 5).

14. Dr. MacCornack checked Mr. Barta's heart, lungs and his spine. He asked Mr. Barta about his neck and back injuries. (Tr. 60). Dr. MacCornack checked the range -of motion of Mr. Barta's neck, arms and legs. (Tr. 61). He also observed Mr. Barta walking without his brace and examined the fixed plastic brace which Mr. Barta wears. Dr. MacCornack did not subject Mr. Barta to any strength tests, agility tests nor did he take any x-rays. (Ex. 30, p. 26; Tr. 64, 66). He did check Mr. Barta's eyes, ears, mouth and reflexes- Dr. MacCornack's examination took approximately 15 minutes. (Tr. 66). He did not contact Mr. Barta's personal physician. (Ex. 30, pp. 29-30).

15. Dr. MacCornack's written comments after the examination indicated that he learned from the patient that there was a fracture of the spine at C-1 and C-2 which had been stabilized through a posterior cervical laminectomy but that Mr. Barta had almost full mobility of his neck. He also noted that there was a fracture at T-5, T-6 and T-7 with subsequent Brown Sequard syndrome and a subsequent paresis of the left lower leg. He noted a loss of dorsiflexion (movement backward at the ankle) in the left foot with atrophy of the gastrocenmius or calf muscle. (Ex. 30, p. 21 ; Tr. 21 9, 221) . In other words, Dr. MacCornack found nerve damage to the spinal cord with a loss of function in the left foot and left lower leg with a wasting of the muscles in that leg, as well as some sensory changes of the right lower leg. (Ex. 30, p. 10).

16. At the conclusion of the examination Mr. Barta asked Dr. MacCornack what the outcome would be. Dr. MacCornack advised him that he was not a good risk for a Correctional Officer position since, if physical contact occurred,

he might be injured more severely due to his past injuries. (Tr. 69). In Dr. MacCornack's opinion, Mr. Barta's nerve deficit allowed him a smaller margin of safety and could result in further injury. He also felt that Mr. Barta was less maneuverable than a normal individual and would be at a disadvantage in defending himself. (Ex. 30, pp. 13-14, 28). Neither Dr. MacCornack nor ACF give Correctional Officer candidates any test of their physical ability apart from the physical examination. (Tr. 83).

17. After the examination Dr. MacCornack forwarded an exam evaluation report to ACF which indicated that Mr. Barta was suitable for work but with the restriction that he was not a candidate for being exposed to physical violence. (Ex. 29; Ex. 30, p. 12). When Mr. Skavnak received this exam report from Dr. MacCornack, he -called the doctor and they discussed Mr. Barta's condition. (Tr. 455). On December 31, 1984, Mr. Skavnak called Mr. Barta and told him that he would not be able to offer Mr. Barta the job as Correctional Officer due to Dr. MacCornack's recommendation. (Tr. 70). Mr. Skavnak stated there was physical contact at ACF and that Dr. MacCornack had stated that if Mr. Barta was exposed to physical violence he would have a greater risk of injury. (Tr. 71). Mr. Barta told Mr. Skavnak that he felt Dr. MacCornack was not aware of all the circumstances. Mr. Barta suggested that he be further evaluated at the Mayo Clinic and asked that Mr. Skavnak reconsider. Mr. Skavnak said that it was the policy to follow Dr.

MacCornack's recommendations and that he had to stand by it. (Tr. 74).

18. Mr. Barta then sent a letter dated January 4, 1985 to Mr. Skavnak asking him to reconsider his decision. (Tr. 75). He stated that he had arranged an appointment with his orthopedic surgeon, Dr. Miguel Cabanella of the Mayo Clinic and would forward his report to Mr. Skavnak to assist in his reconsideration. (Ex. F). Mr. Skavnak replied to Mr. Barta in a letter dated January 11, 1985 in which he indicated that Correctional Officers are continually exposed to hazardous situations and that the pre-employment physical had indicated that Mr. Barta should not be exposed to any physical violence. He. therefore indicated that he would not reconsider the decision not to employ Mr. Barta. (Ex. G).

19. On January 29, 1985 Mr. Barta's attorney, Michael D. Klampe, forwarded to Mr. Skavnak a letter from Dr. Cabanella concerning Mr. Barta's present condition. Mr. Klampe requested that Mr. Skavnak reconsider his decision in view of the information in Dr. Cabanella's report. (Ex. Z). Dr. Cabanella re-evaluated Mr. Barta on January 10, 1985. His report notes that Mr. Barta had no neck or upper back symptoms whatever at that time and walked well with a short leg brace. Dr. Cabanella stated that Mr. Barta had minimally decreased rotation and lateral bending of the neck and a normal neuralogical examination in the upper extremities. He found normal strength of the neck musculature and no evidence of instability in his neck. He stated that from a strict orthopedic standpoint he could see no reason why Mr. Barta should not be able to work as a Correctional Officer. He stated that although Mr. Barta has had a significant injury he has had a very satisfactory recovery from his injuries and that the risk of injury to the neck is similar to that of a normal individual. (Ex. I). The medical bills incurred by Mr. Barta in connection with his January 10, 1985 examination by Dr. Cabanella at Mayo Clinic included $140.50 for the examination and consultation, $249.20 for x-rays and $9.75 for urology service or a total of $399.45. (Tr. 89-90;

Ex. L).

20. IV. Skavnak transmitted Dr. Cabanella's letter to Dr. MacCornack and asked him to review it and advise Mr. Skavnak of his findings. (Ex. AA). Dr. MacCornack wrote to Mr. Skavnak on February 7, 1985 and stated that he had reviewed Dr. Cabanella's report. He stated that it remained his judgment that if one is to consider the potential employer's position, it would be necessary to conclude that exposing Mr. Barta to the potential hazards of a Correctional Officer would not be in the best interests of either the employer or Mr. Barta. He stated that the risk was a very real one and that there is a potential danger involved in Mr. Barta doing the work that was outlined for him to do. (Ex. BB).

21. On February 15, 1985 Mr. Skavnak again wrote to Mr. Barta and advised him that the matter had again been reviewed with Dr. MacCornack. Mr. Skavnak stated that Dr. MacCornack felt that there was considerable risk in exposing Mr. Barta to the hazards inherent in the work of a Correctional Officer, that Mr. Skavnak agreed, and that he would not change hi!; original employment decision. (Ex. J).

22. CM the advice of his attorney, Mr. Barta then filed a charge of discrimination with the Minnesota Department of Human Rights on March 13,

1985, alleging that Hennepin County Adult Corrections Facility discriminated against him in employment on the basis of his disability. (Ex. K). Mr. Barta paid attorney fees of $149.00 to Mr. Klampe for his services which included two meetings and the letter written by Mr. Klampe. (Tr. 134). In a responsive letter to the Department dated April 16, 1985, Mr. Skavnak stated that Mr. Barta's examination indicated that he is a candidate for serious back injury if he attempted to physically wrestle, take-down, restrain or remove violent inmates. Mr. Skavnak also started that Mr. Barta's employment would jeopardize his safety, as well as that of staff and inmates. (Ex. R).

23. When Mr. Barta heard from Mr. Skavnak, prior to the physical examination, that he would have the job, he advised his friends and relatives, who were in town for the Christmas holidays, that he would- be working as a Correctional Officer for Hennepin County. (Tr. 84). Mr. Barta's wife was also pleased about his new employment because she wanted to move to Minneapolis and attend school here. She did not like Rochester and did not have any friends there. (Tr. 86-87). When Mr. Barta was later denied the position he had to explain to everyone that he wasn't getting the job and the reason for the rejection. (Tr. 85). Mr. Barta and his wife were separated in July of 1985 and later divorced. Mr. Barta believes that being rejected for the Correctional Officer position contributed to the demise of his marriage.

24. After the automobile accident on August of 1982, Mr. Barta switched the emphasis in his college studies from law enforcement to corrections since he was concerned that his injuries would prevent his employment as a law enforcement officer. (Tr. 112). His career goal is to move into a supervisory or administrative position in corrections. The Correctional Officer position is an entry level position for such a career ladder. (Tr. 84). When Mr. Barta was rejected for Correctional Officer he became concerned that he would no longer be able to pursue a career in his chosen field and

that the rejection might affect his chances for future employment.

25. After Mr. Barta was rejected for the temporary full-time Correctional Officer position, based upon the medical report from Dr. MacCornack, Mr. Skavnak selected Michael Conery for the position and he began work January 7, 1985 at a salary of $1,509.00 per month. (Tr. 305-306, 311). On April 14, 1985, Mr. Conery was hired as permanent full-time Correctional Officer on a probationary basis at the same salary. (Tr. 306). On October 13, 1985 he received a salary increase to $1,600.00 per month. Subsequently, Mr. Conery received a salary increase retroactive to April 14, 1985 at a monthly salary of $1,664.00 per month. On January 5, 1986 Mr. Conery, received a salary increase to $1,731 .00 per month. On April 13, 1986, Mr. Conery received a salary increase to $1,816.00 per month at which point he completed his probation. (Ex.-T). He remained a full-time Correctional Officer with ACF at the time of the hearing. Six permanent full-time Correctional Officers were hired during 1985. (Tr. 313; Ex. U). A permanent -Full-time Correctional Officer receives, in addition to salary, vacation, sick leave, medical benefits, life insurance, holiday pay and, after 5 years, stability pay. (Tr. 317).

The Hennepin County Adult Correctional Facility.

26. Ile Hennepin County Adult Correctional Facility ("ACF") is a medium security facility located on an 80-acre tract of land in Plymouth. (Tr. 390). The facility has a capacity of 410 inmates and currently houses 392 inmates. (Tr. 386). On weekends the facility exceeds Its capacity due to the addition of persons convicted of driving while intoxicated who are serving two-day sentences over the weekend. The facility admits between 8,000 and 9,000 people per year. ACF is an open facility which means that the inmates are free to move to various programming areas within the facility. (Tr. 391).

27. The physical plant is arranged similar to the state prison at Stillwater in that it consists of a long corridor and cell blocks three levels high. (Ex. 2; Ex 3; Tr. 389). Each cell block contains approximately 45,000 square feet and there is also a dining room and laundry area. The facility houses felons (40%), gross misdemeanants (30%) and misdemeanants (30%). The felons have been convicted of burglary, theft, arson, assault, sexual offenses and narcotics violations. (Tr. 395) . The average age of an inmate is 29, which includes the older DWI misdemeanants. The facility has a large minority population and suffers from racial conflict. (Tr. 396). The facility also has an active gang population including 28 inmates who are known members of gangs. (Tr. 406). The atmotphere inside the facility is noisy and active.

28. There are 13 Correctional Officers working on the first and the second shift which includes those officers assigned to food preparation and the laundry. The third shift, from 11:00 P.M. to 7:00 A.M. has 6 Correctional Officers. (Tr. 387) The staff to inmate ratio is approximately one to 25. (Tr. 392). The Correctional Officers do not carry weapons but have a portable radio. Some officers have handcuffs. (Tr. 411). All of the Correctional

Officer positions involve inmate contact. Those involving less contact are normally held by senior officers. (Tr. 414). Officers currently range in age from those in their twenties to those in their fifties. (Tr. 468). New Correctional Officers initially rotate through all three shifts. (Tr. 415). The Correctional Officers are charged with maintaining discipline and control in the facility and must. involve themselves to quell disturbances between inmates. Weapons and drugs are sometimes found on inmates in the facility. (Tr. 413). The officers supervise inmates during the day at the facility and also transport them to various locations, such as court. (Tr. 402-403). ACF has three light-duty positions for Correctional Officers who are temporarily restricted from Correctional Officer duty due to an injury which will only temporarily hinder the officer, such as a broken arm. (Tr. 357-359).

29. The job description for a Correctional Officer at ACF includes the following examples of duties:

> EXAMPLES OF DUTIES: Enforces appropriate Minnesota statutes relating to the confinement of prisoners; controls residents from stations or by patrolling in cell blocks, yard, grounds, corridors, dormitories, or work areas; escorts individuals or groups of residents to work or other assignments (or activities; maintains order and discipline at all times; may place inmates in restraining devices; keeps continual count of residents assigned; assists in searching for- escapees, their capture and return to the

facility; inspects cells, recreation areas, grounds, work location, and other facilities for unauthorized objects or materials; maintains and checks order, safety and the well-being of residents; searches residents; enforces rules of conduct, security, and labor standards', observes resident behavior and reports significant behaviors to appropriate medical or social service staff; prepares verbal or written reports including disciplinary reports; may search visitors; may assist in the supervision of residents on appearance in courts or in transfers to other institutions; supervises work crew activity and may participate in work crew activity; maintains cleanliness in confined areas of the institution; handles routine daily concerns of residents and refers to other staff sources when appropriate', sits on resident discipline boards, may drive vehicles related to resident transportation; may assist in the processing of residents in and out: may prepare and maintain records of resident funds and personal property; may supervise and instruct residents in the operation of laundry equipment: kitchen equipment, industrial production equipment, stockroom or grounds maintenance equipment; may operate rescue equipment and may perform emergency first aid; may provide custody of court evidence; performs other duties as required.

(Ex. DD).

30. The job description also includes a statement of the necessary knowledge, abilities and skills:

Knowledge, Abilities, and Skills. Good knowledge of

security concepts and institutional procedures; good knowledge of the overall objectives of rehabilitation in a correctional institution; good knowledge of stores management, institutional cooking, large scale laundry or grounds maintenance or industrial operations may be required for certain positions.

Working ability to observe and report resident behaviors; working ability to direct varied activities of a group of adults, both formal and informal; working ability to think quickly and to act in an emergency; working ability to train adults assigned to unfamiliar tasks,, working ability to deal with persons displaying asocial or antisocial behavior; working ability to interpret and enforce institutional rules and regulations. Working skill in establishing and maintaining effective relations with residents; working skill in communicating verbally and in writing observed resident behaviors to appropriate staff.

(Ex. DD).

31. Correctional Officers are responsible for patrolling cell blocks and

escorting inmates. If an officer needs assistance, a "III" call is put out on the radio or the loudspeaker. At that point each Correctional Officer who is free to do so is expected to run fast to the officer needing assistance. Some officers, however, are not free to leave their posts, such as those supervising a group of inmates in recreation. (Tr. 426-428). The officers may have to travel to any point on the 80-acre property within the facility or they may have to travel up or down the cell blocks which are only connected on the main floor which means that an officer might have to go down one cell block and up another. (Tr. 431-432). The cell blocks are accessed by conventional stairways (Ex. 6; Ex. 7). Circular or spiral stairways are present inside the guard cages and leading to the basement storage area. (Tr. 419, En 8; Ex. 9; Ex. 10). Correctional officers also must be able to negotiate a ladder to the roof of the facility in co-der to reach certain posts. (Tr. 419, 421; Ex. 13-17). Officers are also expected to be able to use self-contained air units and other emergency medical equipment. (Tr. 419; Ex. 18-24).

32. The Standard Operating Procedures (SOP) of the ACF authorizes Correctional Officers to us(? reasonable physical force to defend themselves, to prevent an escape, to prevent serious injury to persons or property, to quell a serious disturbance or riot, and to control intractable residents who refuse to obey a lawful order. (Ex. 22, pp. 1-2). -le SOP provides that in handling violent situations a Correctional Officer should first attempt to verbally convince a resident to cooperate and if that fails to then warn the resident of the consequences of non-cooperation. If the warnings are not effective, the officer is then to call for backup personnel for a show of force. If that is insufficient, the officer is then directed to attempt to use physical holds including handcuffs or leg irons to gain control of the resident. If a resident attempts to physically attack a staff member, the officer is directed to call for backup personnel, to block the blows of the

resident, to use take-down techniques to gain control over the resident and finally, if that is not effective, the Correctional Officer is authorized to resort to kicks or blows. (Ex. 27, p. 2).

33. In the course of their duties at ACF, Correctional Officers are often called upon to break up fights between inmates (Ex. 25, p. I , pp. 21 , 22, 33, 40, 42) . This is often followed by placing an inmate into handcuffs. (Ex. 25, pp. I , 1 4, 31 , 32, 34, 35, 38) When an inmate is particularly violent he may be placed into a four point restraint by an officer. (Ex. 25, pp. 6, 14, 41). An officer may have to tackle a resident in order to prevent an assault. (Ex. 25, p. 9). Correctional Officers are also commonly faced with an inmate attempting to kick or strike them when they are in the process of escorting an inmate to a cell or requiring an inmate to submit to a strip search in his cell. (Ex. 25, pp. 18, 23, 37, 41, 45).

34. For the 20-month period from June of 1985 through February of 1987, the following injuries were reported by Correctional Officers in the men's section of ACF as a result of contact with an inmate:

Month	Type of Injury	Cause of Injury
August 1985	Injured Right Elbow	Breaking up fight between residents

August 1985	Left Thumb Sprain	Breaking up fight between two residents
December 1985	1/8th Inch Scratch Index Finger, Left Hand	Removing handcuffs from resident
February 1986	Superficial Cut (1-1/4" long) On Right Wrist	Subduing a resident
February 1986	Struck on Forehead Near Left Eye	-Breaking up fight between two residents
May 1986	Cut lip	Resident assault
September 1986	Superficial Abrasions Pain in Shoulder, Neck and Back	Resident assault on officer
October 1986	Sprain - Left Knee-	Breaking up fight between residents
January 1987	Cut on Left Palm and Little Finger	Subduing violent resident
January 1987	Head Struck Cell Door	Subduing violent resident
February 1987	Cut on Right Thumb and Hurt Back	Subduing violent resident
February 1987	Scratches on Hand and Arms	Subduing violent resident
February 1987	Bruised Right Wrist and Forearm	Subduing violent resident

None of the injuries described above resulted in any lost work time. (Ex. 26).

Medical Testimony.

35. Dr. Miguel E. Cabanella is an orthopedic surgeon with the Mayo Clinic in Rochester. He is Board certified in orthopedic surgery. (Ex. CC, pp.

3-4). He first saw Mr. Barta shortly after his automobile accident in August of 1982. (Ex. CC, p. 13). Dr. Cabanella found that Mr. Barta had a fracture and displacement of the odontoid process, a bony protuberance on the second cervical vertebra. (Ex. CC, p. 14). Mr. Barta also had a fracture of the 5th cervical vertebra and a compression fracture of the 5th and 6th thoracic vertebrae which is about 5 inches below the base of the neck. (Ex. CC, p. 16). As a result of the fracture of the 5th and 6th thoracic vertebrae Mr.

Barta sustained a nerve lesion resulting in a Brown-Sequard' s syndrome. The nerve lesion occurred to one-half of the spinal cord and resulted in one-half of the lower body losing motor power and the other half losing sensory power. (Ex. CC, p. 17). Dr. Cabanella operated on Mr. Barta to fuse the first and second vertebrae and Mr. Barta was then placed in a body cast with a "halo" and later a cervical thoracic brace. (Ex. CC, pp. 18, 23). He was hospitalized for approximately 100 days. (Ex. CC, p. 25).

36. Dr. Cabanella also saw and examined Mr. Barta, on January 10, 1985. At that time Mr. Barta had no neck pain or back symptoms, Dr. Cabanella found a minimal decreased rotation or lateral bending of the neck, a normal neurological examination of the upper extremities, and again noted a mild hump at the level of the upper thoracic spine. He found no instability of the neck or the thoracic spine. (Ex. CC, p. 32). He found that the Brown-Sequard's lesion had recovered with some residual, which was the reason for the leg brace, but that the condition was then stable. (Ex. CC, p. 32). The range of motion of the cervical spine was essentially normal. (Ex. CC, p. 32).

3 7 . It is Dr.. Cabanella's opinion that there is no medical basis for restricting Mr. Barta from being a Correctional officer (Ex. CC, p. 35). From a common sense standpoint, however, he suggested that Mr. Barta should try to avoid being a Correctional Officer or participating in sports such as diving, soccer, rugby or football. (E-x. CC, pp. 34-35) . In Dr. Cabanella's opinion Mr. Barta's range of motion in his cervical spine is for a practical purposes normal and would not impair his ability to act as a Correctional Officer. (Ex. CC, p. 42). Dr. Cabanella also concluded that Mr. Barta was at no increased risk in a scuffle or fight because of any reduced range of motion in his cervical spine and further is of the opinion that he had the same range of motion in his thoracic spine that he would have had without his injuries, and could break a fall or roll normally. (Ex. CC, pp. 44-45). Dr. Cabanella

also concluded that Mr. Barta was at no increased risk of injury in the future due to the spinal injury that he has suffered. (Ex. CC, p. 46). He probably has the same likelihood of injury as anybody else. (Ex. CC, p. 47). Dr. Cabanella agreed that because of the condition in Mr. Barta's foot and his use of a leg brace, he is not as maneuverable, as agile or as fast as a person without his condition. (Ex. CC, pp. 55-56). In Dr. Cabanella's opinion Mr. Barta would be able to walk 7 to 10 miles a day and would be able to stand for eight hours on cement floors. (Ex. CC, p. 58). In Dr. Cabanella's opinion Mr. Barta's leg weakness might interfere with his helping other officers in trouble or protecting inmates in that he might not be able to run fast enough. (Ex. CC, p. 66).

38. Mr. Barta was also examined by Dr. David D. Gregg, who practices occupational medicine at the St. Paul Ramsey Medical Center. Dr. Gregg i s Board certified in internal medicine. (Tr. 493). This examination occurred on December 2, 1986. (Ex. EE) . As a part of the examination, Mr. Barta filled out a 4-page medical history questionnaire and then his height, weight and vision were checked. (Tr. 504, 506), Dr. Gregg then performed a physical examination including checking his eyes, ears, nose, heart, abdomen and neurological factors such as alertness, cranial nerve reflexes, strength, temperature sense, and reaction to pain. (Tr. 511). Dr. Gregg observed a Gibbous deformity of the upper thoracic spine at T-5, 6, but noted a negligible reduction in Mr. Barta's range of motion and concluded that the

Gibbous deformity was insignificant for Mr. Barta's current functioning. Dr. Gregg concluded that Mr. Barta was able to use his head, neck and upper extremities without any limitation and is able to use the right side of his body without any limitation. (Tr. 513; Ex. EE).

39. In regard to Mr. Barta's lower extremities, Dr. Gregg noted the Brown-Sequard syndrome beginning at T-5 on the left side with it decreased sense of hot and cold which then switches at T-7 to the right side. (Tr. 518). - This sensory loss means that Mr. Barta can feel pressure or touch but cannot feel pain. On the left leg, Dr. Gregg noted hypersensitivity to touch and an increased reflex at the left knee and ankle. (Tr. 520). Additionally, there is a spasticity or "twitchiness" below the knee on the left leg. Based upon strength testing, Dr. Gregg concluded that Mr. Barta was normal except for his left foot. In that area he found decreased dorsiflexion, eversion, (turning outward) and inversion (turning inward) at the left foot and minimally decreased strength in the left gastrocenmius or calf muscle. (Ex. EE; Tr. 522). In the left leg Dr. Gregg found decreased strength out distally and he found that Mr. Barta could not resist pressure on ?As toes or foot a great deal . (Tr. 525). The result is a partial left-foot drop which is compensated for by a 90-degree foot brace worn by Air. Barta. fie is able to lift his left foot approximately 112 as much as his right foot. (Tr. 527) . Dr. Gregg noted that Mr. Barta limped_as he walked because he must swing his left foot to the side somewhat to clear the floor. (Tr. 529).

40. Dr. Gregg also contacted Dr. Cabanella in order to find out if Mr. Barta was structurally sound at the neck and thoracic spine and what stress Mr. Barta's spine could tolerate. (Tr. 563; Ex. EE). Dr. Cabanella advised Dr. Gregg that Mr. Barta's spine was stable and could tolerate the stress involved in the Correctional Officer position. (Ex. EE). Dr. Cabanella felt that Mr. Barta would be at no increased risk of injury as a Correctional Officer. (Tr. 564).

41. Dr. Gregg also obtained information concerning the position of Correctional Officer at ACF. He asked for and reviewed, a Correctional Officer job description, Workers Compensation First Report of Injuries and ACF incident reports for 1982 through 1984. He reviewed 101 First Report of Injury forms. (Tr. 545). Twenty-three First Reports of Injury were filed by ACF Correctional Officers in 1982. Six involved contact with an inmate. One of the six injuries involved lost work time, namely two days for a wrist sprain. Other injuries due to inmate contact included bruised ribs, bruised jaw, knee, sprained hamstring, and a hand bite. (Tr. 548). In 1983, 41 First Reports of Injury were filed, of which five involved an inmate. Two of the five involved lost work days. a knee injury with cartilage damage resulted in 78 lost work days-and a bruise to the right arm resulted in two lost work days. Other injuries due to inmate involvement included a sprain of the right hand, a sprain of the back and cuts on 'the arm and back. (Tr. 549). Thirty-seven First Reports of Injury were filed in 1984. Four involved an inmate and no work days were lost. The injuries included a bite to the hand, a bite to the head, a strained shoulder, and a bruised arm. (Tr. 550). Dr. Gregg also reviewed reports from the "use of force" file at ACF for 1985 and 1986. He found that over 1/2 of the incidents involved three or more officers and that only one involved a single officer. (Tr. 554-555). Of the 26 Reports reviewed for 1985, thirteen involved the use of handcuffs and four

involved taking the inmate to the floor. (Tr. 557). Although Dr. Gregg anticipated that there were stairways at ACF he was not aware of the spiral staircase or the need to access the rooftop. (Tr. 561).

42. Based upon his physical examination of Mr. Barta, his conversation with Dr. Cabanella and his review of the materials, Dr. Gregg concluded that there was a very low or negligible probability of injury to Mr. Barta or his co-employees (due to his disability if he took the position of Correctional Officer. (Tr. 567, 628, 633). He feels that Mr. Barta would have no trouble planting his left foot in order to use his upper body and generate force and he therefore could wrestle take-down and restrain inmates and could protect himself and help other officers. (Tr. 569). He states that Mr. Barta is able to navigate stairs, including a spiral staircase, and that although he is not normal in walking or running he does compensate for his foot brace, is mobile, and could arrive at a location to assist in an adequate time. (Tr. 571, 631).

43. Dr. Gregg concluded that Dr. MacCornack did not have sufficient information in order to make the restrictions he suggested since he had not talked to Dr. Cabanella concerning the stability of the spine and did not conduct strength or agility tests of the leg or foot in order to ascertain the degree of loss. (Tr. 577). He also believes that Dr. MacCornack's conclusion that there is i "nerve deficit" may be misleading since the spine is stable and that although the nerve fibers have been damaged, this injury is done and cannot be reinjured. (Tr. 580). Dr. Gregg believes that it will require as much force to Mr. Barta's spine to cause injury as it would for anyone else. (Tr. 580). Dr. Gregg acknowledged that Mr. Barta had some difficulty with a deep knee bend but that he would be able to get to the floor if necessary even if with some difficulty. He believes that Mr. Barta is able to run fast enough to get to the aid of fellow officers and is able to respond when he arrives.

44. Mr. Barta's medical records were also reviewed by Dr. Dean W. Erickson, who specializes in occupational medicine at the Airport Medical Clinic. Dr. Erickson is Board certified in internal and occupational medicine. (Tr. 179). He reviewed the medical records from the Mayo Clinic, Dr. MacCornack's report, Dr. Gregg's report, job information from ACF, as well as the prehearing depositions of Mr. Barta, Dr. MacCornack and Dr Cabanella. He also visited ACF. (Tr. 193-194). Dr. Erickson concluded that Mr. Barta should not be a candidate for the position of Correctional Officer in the best interest of his own health and in the best interests of other officers. (Tr. 196, 198). Dr. Erickson concluded that Mr. Barta is at a greater risk for injury since he is not as maneuverable and his muscle strength and ability to respond are in question. (Tr. 256). Dr. Erickson concluded that the left foot is the primary reason for a restriction since Mr. Barta has difficulty lifting the foot, turning the foot in and out and pushing down. (Tr. 219-222, 261, 264). Although the brace compensates for this, it is difficult to turn with the brace. (Tr. 262). Dr. Erickson also offered the opinion that the examination performed by Dr. MacCornack was standard and was adequate to support his conclusions. (Tr. 200).

44. Mr. Barta acknowledges that he walks with -a limp. (Tr. 1 52) . His left ankle is mostly but not completely immobilized by the brace he wears.

(Tr. 1 31) . The plastic brace that he currently wears is one foot high. (Tr. 1 32) In his current job Mr. Barta must walk up and down a stairs frequently during the day, but he does not need to do so with an), speed. (Tr. 145, 1 54) . He acknowledges that climbing stairs is more difficult for him since his accident and that it is possible that he cannot run up or down stairs. (Tr. 121, 124).

Later Correctional Officer Hirings.

45. On March 14, 1985, the Hennepin County Personnel Department issued a certification report to ACF to enable it to fill two full-time, permanent Correctional officer positions. (Ex. FF). The report included nine names eligible for appointment, as well as three extra names which could be interviewed if three of the first nine were not interested. (Tr. 660). The Correctional Officer eligibility list from which the names were drawn was the same one used since the fall of 1984 and was effective for 12 months. (Tr. 666, 680, 683-684).

46. The first five people on the certification report either were not interested in the position or declined a job offer. (Ex FF) . lb. Skavnak proceeded to interview eligibles six through nine, as well as two of the three "extra" people included on the list.- (Tr. 681). These six, as they were ranked on the list, and their disposition, was as follows:

Guy Hanson - selected: date of hire - 4-28-85
Michael Conery selected: date of hire - 4-14-85
Douglas Flory not selected: other candidate more suitable
Robert Satter declined job offer
Daniel Freese not selected: other candidate more suitable
William Pieri not selected: other candidate more suitable
(Ex. FF).

Mr. Freese and Mr. Pieri were not among the first nine names certified, but were the first two "extra names" on the list. (Ex. FF). On the December 13, 1984 certification report, Mark Barta ranked above William Pieri (Tr. 687; Ex.

S), but below Robert Satter. (Tr. 693).

47. Michael W. Conery, who was hired as a full-time, permanent Correctional Officer on April 14, 1985, was employed as a security officer at the Hennepin County Juvenile Justice Center from April of 1984 to December of 1984 when he was hired as -a temporary full-time Correctional Officer by Mr. Skavnak. (Ex. 31 ; Tr. 702). Mr. Conery was also employed as a security officer with Sims Security, Inc. from August of 1983 to June of 1984. (Ex. 31). Guy Hanson was hired as a full-time permanent Correctional Officer on April 28, 1985. (Ex. FF). Mr. Skavnak first hired him as an intermittent permanent Correctional Officer on December 26, 1984. (Ex. S). Mr. Hanson had experience, as a part-time military police officer with the U.S. Army and served as a security officer at a shopping center from November of 1981 to December of 1984. (Ex. 32)). Mr. Hanson was also recommended to Mr. Skavnak by an ACF supervisor. (Tr. 702, 704).

Based upon the foregoing Findings of Fact, the Administrative Law Judge

makes the following:

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction in this matter pursuant to Minn. Stat. 14.50 and 363.071.

2. The Complainant gave proper notice of the hearing in this matter and has fulfilled all relevant substantive and-procedural requirements of law or rule.

3. The Respondent is an employer as defined in Minn. Stat. 363.01, subd. 15.

4, Minn. Stat. 363.03, subd. 1 provides, in part, as follows:

> Subdivision 1. Employment. Except when based on a bona fide occupational qualification, it is an unfair employment practice:
>
> (2) For an employer, because if disability,
>
> (a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment;

5. Minn. Stat. 363.01, subd. 25 defines "disability" as follows:

> "Disability" means any condition or characteristic that renders a person a disabled person. a disabled person is any person who (1) has a physical or mental impairment which substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.

6. That the Charging Party has been shown to to disabled within the meaning of the foregoing definition.

7. That the Complainant has proved that the Charging Party was qualified for the position of Correctional Officer with Hennepin County.

8. That the Complainant has proved a prima facie case of employment discrimination.

9. That the Respondent has not proved that its failure to hire the Charging Party was based on a bona fide occupational qualification.

10. Minn. Stat. 363.02, subd. 5 provides as follows:

> Subd. 5. Disability. Nothing in this chapter shall be construed to prohibit any program, service, facility or

privilege afforded to it person with a disability which is intended to habilitate, rehabilitate or accommodate that person. It is a defense to a complaint or action brought under this chapter that the person bringing the complaint or action has a disability which in the circumstances and even with reasonable accommodation , as defined in section 363.03, subdivision 1, clause (6), poses a serious threat to the health or safety of the disabled person or others. The burden of proving this defense is upon the respondent.

11. That the Respondent has not proved that the Charging Party has a disability which in the circumstances poses a serious threat to the health or safety of the Charging Party or others.

12. That the Complainant has proved by a preponderance of the evidence that the Respondent discriminated against the Charging Party by refusing him employment.

13. The reasons for the above Conclusions of Law ire set out in the Memorandum which follows and which is incorporated into these Conclusions of Law by reference.

14. Any Finding of Fact which is more properly classified as a Conclusion of Law is hereby adopted as such.

Pursuant to the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

(1) Hennepin County shall cease and desist from discriminating against job applicants on the basis of a disability.

(2) Hennepin County shall pay to the Charging Party, Mark R. Barta, compensatory damages in the amount of $10,004.90, determined as follows:

a. $6,173.07 for back pay,
b. $ 783.38 as interest on the back pay award,
c. $ 399.45 for medical expenses incurred
d. $ 149.00 for attorney's fees incurred, and
e. $2,500.00 for mental anguish and suffering.

(3) Hennepin County shall pay to the Chief Administrative Law Judge a civil penalty in the amount of $3,000.00 made payable to "State Treasurer-General Fund."

Dated: August 21 1987.

GEORGE A. BECK
Administrative Law Judge

Reported: Taped. Transcript Prepared by Mary Ann Hintz.
Route 4, Box 142
Isanti, MN 55040

MEMORANDUM

This contested case proceeding _is brought under the Minnesota Human Rights Act. The Act provides that it is an unfair employment practice for an employer to refuse to hire a person due to his disability. The Commissioner of Human Rights alleges that Hennepin County has unlawfully refused to hire the Charging Party, Mark R. Barta for the position of Correctional Officer at its Adult Correctional Facility, due to his disability.

The Method of Analysis.

The claim is one of disparate treatment. It is alleged that the employer, in not hiring the Charging Party, treated him less favorably than others on the basis of an impermissible classification, namely his disability. Hubbard v. United Press International, 330 N.W.2d 428, 442 (Minn. 1983). In a disparate treatment case, proof of discriminatory motive or intent is critical, however it can be inferred from the disparate treatment. International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 335-36 n. 15 (1977). The Minnesota Supreme Court has adopted the three-part analysis first set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) for the

adjudication of cases brought under the Act. Danz v. Jones, 263 N.W.2d 395 (Minn. 1978); Sigurdson v. Isanti County, 386 N.W.2d 715, 719-20 (Minn. 1986).

The McDonnell Douglas analysis consists of a prima facie case, an answer by the employer and a rebuttal. First, the Complainant must present a prima facie case of discrimination by a preponderance of the evidence. Sigurdson, supra, 386 N.W.2d at 720. The specific elements of a prima facie case are modified to fit varying factual patterns and employment contexts. Hubbard, supra, 330 N.W.2d at 442. In the case of disability discrimination, the Complainant must show that (1) the Charging Party is disabled within the meaning of Minn Stat. VXEG he applied for and met the minimum qualifications for employment; (3) he was rejected for the position;

and (4) that the employer continued to seek applicants for the position. State v . Metropolitan Airport Commission, 358 N.W.2d 432, 433 (Minn.App. 1984). C.f., State v. Scientific Computers, Inc., 393 N.W.2d 200, 202 (Minn.App. 1986). In this case there is no dispute that Mr. Barta was rejected for the position and that Hennepin County continued to seek to fill the position. In its post-hearing briefs, Hennepin County did not argue that Mr. Barta was not disabled. Hennepin County does argue, however, that Mr. Barta was not qualified to be a Correctional Officer.

Where the Complainant is successful in establishing a prima facie case, the burden of production of the evidence normally shifts to the employer to present evidence of a legitimate, non-discriminatory reason for its actions. Sigurdson, supra, 386 N.W.2d at 720; Department of Community Affairs v. Burdine, 450 U.S. 248, 255-256 (1981). The employer's burden in this regard is a light one; it need not prove that it was motivated by the reason offered. Burdine, supra, 450 U.S. at 254. The question to be considered is whether there is evidence that the employer's actions are related to a legitimate business purpose. Furnco Construction Corp v. Waters, 438 _U.S. 567, 5 7 7 (1978). If the employer is successful, the third step of the analysis requires the Complainant to show that the reason offered by the employer is actually a pretext for discrimination. At this stage the Complainant must persuade the factfinder by a preponderance of the evidence that the employer intentionally discriminated against, the Charging Party. Sigurdson, supra, 386 N.W.2d at 720.

In its post-hearing memorandum the Complainant argues that this case should not be analyzed pursuant to McDonnell Douglas because direct evidence of discrimination has been presented. In Trans World Airlines v. Thurston, 105 S.Ct. 613 (1985), the United States Supreme Court found the McDonnell Douglas test to be inapplicable where the plaintiff presented direct evidence

of discrimination. It noted that the McDonnell Douglas analysis was designed to assure a plaintiff his day in court despite the unavailability of direct evidence. 105 S.Ct. at 622. In Thurston the direct evidence was TWA's policy which permitted only captains under 60 years of age to "bump" less senior flight engineers when the captains became disqualified for any reason other than age. The Court found this policy to be discriminatory on its face and therefore found the McDonnell _Douglas analysis to be unnecessary and inapplicable. Once direct evidence of discrimination is presented the burden of persuasion switches to the defendant to prove, for example, that the same decision would have been made even without the discriminatory factor, Bell v. Birmingham Linen Service, 715 F.2d 1552, 1557 (llth Cir. 1983) or to prove that a BFOQ is necessary to the operation of the business. Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1085-6 (8th.Cir. 1980). Under the Thurston analysis the burden of persuasion shifts to the defendant upon- proof of discrimination while under the McDonnell Douglas analysis the ultimate burden of persuasion remains with the plaintiff.

The Respondent argues that this case should be analyzed pursuant to McDonnell Douglas since there is no direct evidence of discrimination in the record. The federal cases which have found direct evidence of discrimination appeared to fall into two classifications. Some of the cases involve a statement by a manager which demonstrates bias. In Bell v. Birmingham Linen Service, supra, 715 F.2d at 1557, the supervisor stated that if the female

plaintiff were allowed in a particular work area then all the women would want to be so assigned. In Lowe v. City of Monrovia, 41 F.E..P. 931, 936 (9th.Cir. 1986) the city personnel division manager told a black, female applicant that the city police force had no women or blacks and suggested that she apply in another city where the police department was "literally begging for minorities and especially females". A racial slur by the supervisor in charge of employee evaluations and rehiring was the direct evidence in Miles v. MNC Corp., 36 F.E.P. 1289, 1296 (11th.Cir. 1985). In Lee v. Russell County Board of Education, 684 F.2d 769 (11th.Cir. 1982), school officials attempted to cultivate a greater "white presence" among the school staff and instructed supervisors to "build files" with the objective of dismissing minority teachers. the Respondent points out that the record does not contain any statement by Mr. Skavnak or anyone else associated Ott Hennepin County which indicates a bias against disabled persons. The County argues that the direct evidence must show that the employer made a decision based solely on the basis of protected class status rather than on an evaluation of the individual's characteristics.

Another line of federal cases have found direct evidence of discrimination in the form of an employer's policy which on its face calls for the consideration of a prohibited factor. One example is Thurston, supra. Others include EEOC v. City of St. Paul, 500 F.Supp 1135, 1144 (D.Minn. 1980) where the EMPloyer's Decision to retire employees solely cm the basis of age was found to be a per see violation of the Age Discrimination in Employment Act (ADEA) which shifted the burden to the employer. In EEOC v. City of Minneapolis, 537 F.Supp. 750, 756 (D.Minn. 1982) forced retirement at age 65 for a police captain was determined to be a per se violation of the ADEA. Where a prison admitted it did not promote women to its Correctional Officer II position, a prima facie case of overt sex discrimination was shown and the

burden shifted to the prison to show that a BFOQ was reasonably necessary to the normal operation of the institution. Gunther v. Iowa State Men's Reformatory, supra, 612 F.2d at 1085-6.

The Complainant argues that the direct evidence of discrimination in this case is Hennepin County's admission that it did not hire the Charging Party due to his past back and neck injuries and the physical residuals of those injuries. It is concluded, however, that this case is properly analyzed under the McDonnell Douglas analysis. The "direct evidence" suggested by the Complainant does not fit comfortably into either line of federal cases describing direct evidence since there is no direct statement by a manager showing bias against a class nor is there a blanket policy by the employer against hiring a particular (:lass or sub-class. In this case an individual evaluation of the Charging Party was made as a part of the hiring process.

Additionally, the Minnesota appellate courts appear to have expressed a preference for the McDonnell Douglas analysis even where direct testimony of discriminatory statements is contained in the record. In Sigurdson v. Isanti County, 386 N.W.2d 715, 720,(Minn. 1986), the Supreme Court employed the McDonnell Douglas analysis even though the hiring authority had stated that "field work is not woman's work" and that "it would present a bad public image for a woman and a man to perform outside field work as a team". 386 N.W.2d at 717. Additionally, in State v. Sports and Health Club, Inc., 365 N.W.2d 799, 802 (Minn.App. 1985) the Court of Appeals favored the McDonnell Douglas

analysis over a direct evidence approach where a receptionist told the applicant that the employer preferred women as receptionists. In State v. Metropolitan Airport Commission, 358 N.W.2d 432, 433 (Minn.App. 1984), the Court employed a McDonnell Douglas analysis in a. disability case where a decision not to hire was due to the employer's concern that the applicant's lower back condition would pose a serious threat to his health if he were employed in a job requiring him to lift more than 25 pounds.

Applying McDonnell Douglas.

It must be demonstrated as part of a prima facie case that the Charging Party is disabled. A new definition of "disability" was added to the Minnesota Human Rights Act in 1983. The new definition provides that a person is disabled if he has a record of a physical cm mental impairment which substantially limits one or Rare major life activities cm is regarded as having such an impairment. In this case the very serious neck back and leg injuries incurred by Mr.- Barta in 1982 substantially limited his major life activities for a significant period of time following the accident. He was hospitalized for over three months. He therefore has a record of a physical impairment within the meaning of the definition.

Additionally, the Respondent has regarded the Charging Party as having a physical impairment which substantially limits one or Rare major life activities, namely, working. The federal regulation, which interprets a federal statute similar to our state statutory language, specifically lists working as a major life activity. The federal regulations also define "regarded as having such an impairment" to include a physical impairment that does not substantially limit a major life activity but is treated by an employer as constituting such a limitation. 29 C.F.R. 1613.702 (1986), 45 C.F.R. 84.3 (1986). The Respondent did not argue in its post-hearing brief that the Charging Party was not disabled. It is concluded that Mr. Barta is

disabled within the meaning of the Minnesota statutory definition. Such a conclusion is consistent with the interpretations made by Minnesota appellate courts in disability discrimination cases See, e.g., Lewis v. Remmele Engineering Co. , 314 Minn. 2d 1 (Minn. 1981 State v.. Metropolitan Airport Commission, 358 N.W.2d 432 (Minn.App. 1984).

The only element of the McDonnell Douglas analysis which is in dispute is the question of whether or not Mr. Barta was qualified for the position of Correctional Officer at the ACF. The Metropolitan Airport Commission court stated the requirement as whether the applicant ''met the minimum qualifications for the position". 358 N.W2d at 433. Hennepin County argues that Mr. Barta's diminished speed and mobility would place him - it a distinct disadvantage in -a physical assault situation or in responding to emergencies in various parts of the facility. The Complainant argues that Mr. Barta met the minimum qualifications by reason of being placed on the eligibility list for the position of Correctional Officer and being offered a Correctional officer position conditioned only upon undergoing a medical examination. The Complainant suggests that it is not required to disprove the Respondent's BFOQ and "serious threat" defenses to establish that the Charging Party the minimum qualifications. It notes that in Metropolitan Airport Commission, supra, that minimum qualifications were met despite (evidence that the applicant had a

greater than 50% chance of developing a herniated disc and that approximately 75% of such individuals who do manual labor will become disabled. 358 N.W.2d at 434. The case was then decided upon the "serious threat" defense successfully presented by the employer.

Any consideration of whether or not the individual elements of a McDonnell Douglas analysis have been fulfilled must be made keeping in mind the admonition of the McDonnell Douglas Court that the elements of a prima facie case are flexible and must be tailored to meet differing factual requirements. 411 U.S. at 802. By focusing only on the individual steps in the McDonnell Douglas analysis one may lose sight of the forest for the trees. The ultimate issue is whether there was intentional discrimination on the part of the employer. The central inquiry in evaluating whether the Charging Party has met his initial burden is whether the circumstantial evidence presented is sufficient to create an inference, that is a rebuttable presumption, that the basis of an employment-related decision was an illegal criterion. Schlei and Grossman, Employment Discrimination Law (Cum.Supp. 1983-85), P. 302. An _example of the adjustment of the McDonnell Douglas formula relating to minimum qualifications is Robinson v Arkansas Highway & Transp. Comm., 698 F.2d 957, 30 F.E.P. 1171 (8th.Cir. 1983). In that case a black employee established a prima facie case where the job as advertised did not include a skill that she lacked _namely, shorthand. Likewise, in this case speed in running or climbing were not specifically advertised as job qualifications. (Findings of Fact Nos. 29 and 30).

In Pushkin v. Regents of the University of Colorado, 658 F.2d 1372, 1385-86 (10th.Cir. 1981), the court observed that handicapped discrimination cases are in some respects incompatible with a Title VII analysis since handicapped persons are expressly rejected from employment on the basis of their handicap, whereas in Title VII cases characteristics such as race or sex

are never expressly at issue as legitimate justifications for an applicant's rejection. The Pushkin court determined that a prima facie case was established under the Federal Rehabilitation Act of 1973 by showing that the applicant was an otherwise qualified handicapped person apart from his handicap and was rejected under circumstances which gave rise to the inference that his rejection was based solely on his handicap. While this decision cannot be employed as precedent in this case due to statutory differences between the Rehabilitation Act and Chapter 363, it identifies the difficulty in applying a Title VII analysis to a disability case and suggests a remedy.'

'A reasonable approach to a prima facie case in disability discrimination might be to require the Complainant to show that (1) the Charging Party is disabled within the meaning of the statutory definition, (2) that he applied for and met the minimum qualifications for the position apart from his disability, (3) that he was rejected for the position, and (4) that the employer continued to seek applicants. Such a formulation would mean that the question of whether the disability renders an applicant unqualified would be considered in the context of a serious threat or BFOQ defense, where the burden of persuasion would be on the employer, which has greater familiarity with the requirements of the job in question.

It is properly concluded, based upon this record, and keeping in mind that the McDonnell Douglas formula is intended to be flexible, that Mr. Barta met the minimum qualifications for the position of Correctional Officer. It is clear that apart from his disability he would have been hired by Mr. Skavnak, Pushkin, supra. His training and experience were satisfactory. Beyond that, the factual findings established in this record concerning the nature of the disability and the requirements of the job show that he met the minimum qualifications for the position. What is disputed by Hennepin County is whether or not he can run fast enough to respond to emergencies and whether he can defend himself adequately in an altercation. These are closer to being considerations of how effectively the Charging Party can do his job. They are not considerations which obviously render the Charging Party unqualified for the-purposes of a McDonnell Douglas analysis. They are Factors which are more properly considered under the serious threat defense or the bona fide occupational qualification (BFOQ) defense which are advanced by the Employer in this case. Because these defenses were specifically created by the Legislature, with the burden of proof placed upon the employer, it must be concluded that the Legislature did not intend to require a Charging Party to prove up such matters in its prima facie case. this conclusion seems to be consistent with the Court of Appeals decision in Metropolitan Airport Commission, supra, where the Court found the maintenance worker applicant to be minimally qualified desoite a back disability, but upheld the serious threat defense of the employer.

once a prima facie case is proved by the Complainant, the burden of production would normally shift to the employer for it to present evidence of a legitimate non-discriminatory reason for its actions. In a disability case however, the reason advanced is commonly that the applicant poses a serious threat to his own health or safety or that of others. Or the Respondent might

attempt to show that the lack of a handicap is a bona fide occupational qualification for the particular position being filled. However, the Legislature has put the burden of proof for a serious threat defense upon the Respondent. Minn. Stat. 363.02, subd. 5. Likewise, the burden of proof is upon the employer to establish a bona fide occupational qualification. Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th.Cir. 1969). Accordingly, disability discrimination cases commonly proceed from the establishment of the prima facie case to a consideration of the defenses offered by the employer rather than completing the McDonnell Douglas analysis of the presentation of a legitimate non-discriminatory reason and proof by the Complainant that the reason was a pretext. Such was the case in Metropolitan Airport Commission, supra, 358 N.W.2d at 433, and Khalifa v. G.X. Corporation 408 N.W.2d 221, 225 (Minn.App. 1987).

Were this analysis completed however it would be concluded that Hennepin County had advanced a legitimate non-discriminatory reason for its failure to hire the Charging Party, namely, its concern that he would not be able to defend himself and might not be able to promptly come to the aid of his colleagues. It would also be concluded that the Complainant has proved that the reason advanced by the Respondent was a pretext for discrimination. As a practical matter, however, Hennepin County has essentially admitted that its refusal to hire was due to Mr. Barta's disability and the question to be determined is whether or not this discrimination is legal based upon a serious threat or BFOQ defense.

The Serious Threat Defense.

The serious threat defense is set out in the statute at Minn. Stat. 363.02, subd. 5 and provides that where a person "has a disability which in the circumstances . . . poses a serious threat to the health or safety of the disabled person or others" then the discrimination is not unlawful. The employer has the burden of proof to establish the Defense.

There are only a few Minnesota cases dealing with the serious threat defense. In Lewis v. Remmele Engineering, Inc., 314 N.W.2d I (Minn. 1981), the Supreme Court interpreted the "serious threat" defense set out in the St. Paul Legislative Code to mean that the employer must establish that it relied upon competent medical advice that there exists "a reasonably probable risk of serious harm." 314 N.W.2d at 4. The Court also made it plain that each alleged disability must be examined on an individual basis with regard to the degree of the disability, the current condition of the employee and the nature of the position he sought. In that c a s e , the Court determined that an epileptic could not be a machinist where the machinery was extremely hazardous and the type of epilepsy from which he suffered provided no warning prior to a total loss of consciousness. It appears that the Court, in that case, was examining the possible severity of the 'consequences if an accident occured. It also considered the likelihood of an occurrence by adopting the "reasonably probable risk of serious harm" test. In Lewis v. Metropolitan Transit Commission, 320 N.W.2d 426 (Minn. 1982), the Court decided that the employer had established by competent medical advice that the disability, namely, vision in one eye which was not correctable, was a serious threat to the safety of others for the job of bus driver. 320 N.W.2d at 430. In Pearson Candy Co. v. Huyen, 373 N.W.2d 377 (Minn.App. 1985). the Court of Appeals determined that there was substantial evidence that an applicant for assembly line worker, who had grand malepilepsy, posed a serious threat to herself and

others. The Court noted that it was clear that a seizure would cause injury by causing a fall into the machinery. The record indicated that the applicant had not taken her medication for a period of time and had experienced a seizure when she had forgotten to take her medication.

The employer's obligation then is to prove a serious threat to the safety of Mr. Barta or others. In doing so the employer must demonstrate a reasonably probable risk of serious harm. The case law also indicates that in considering whether or not the employer has met its burden, it: is appropriate to consider the likelihood of an occurrence of the threat as well as the severity of the consequences if a problem should occur. The Respondent argues in its brief that the facts of this case are strikingly similar to Pearson Candy Co., supra. While some of the procedural steps which occurred are similar, it seems clear that, as the Supreme court indicated in Remmele Engineering, supra, each disability case must be examined on a individual basis. The statutory criteria, as well as the case law interpretations, must be applied to the peculiar facts of this case, focusing on the nature of the disability and the nature of the position of Correctional Officer.

The nature of Mr. Barta's injuries are well documented in the record. As a result of the fracture of his fifth and sixth thoracic verterbrae he

sustained a nerve lesion resulting in a Brown-Sequard's syndrome. One result of the syndrome is a wasting of and decreased strength in his left calf muscle. Additionally. he has a decreased ability to turn his foot backward, outward and inward at the ankle on the left foot. The result is a partial left foot drop which is compensated for by a. 90-degree plastic foot brace which is approximately one foot high. Mr. Barta is able to lift his left foot approximately one half as much as his right foot. He walks with an observable but not a pronounced limp. It is admitted that Mr. Barta cannot run or climb stairs as rapidly as he could prior to his accident.

There was also testimony as to such conditions as spasticity in the lower left leg, increased reflex in the left knee, sensory changes in the right lower leg and a possible loss of motion in the back and neck. As to the spasticity, the increased reflex, and the decreased sense of hot and cold in the right leg, the record seems clear that these symptoms are not the cause of any disability which would affect Mr. Barta's performance in the position for which he has applied. Dr. MacCornack was of the opinion, however, that Mr. Barta had a loss of mobility in his cervical and thoracic spine which was significant to his possible employment. He also stated that the nerve damage Mr. Barta had sustained left him with a smaller "margin of safety" than a normal person, which would place him at a greater risk of future injury. It is specifically concluded, however, based upon the testimony of Dr. Cabanella, Dr. Gregg and Dr. Erickson that any decrease in the mobility of Mr. Barta's cervical spine was insignificant and that there was no decrease in the mobility of Mr. Barta's thoracic spine. In regard to the alleged "smaller margin of safety" the testimony of Dr. Cabanella is specifically credited. He testified that Mr. Barta's spine was structurally sound and that he was at no increased risk of injury in the future due to the spinal injury that he had suffered. He testified that Mr. Barta has the same likelihood of injury as

any other person in that regard. Dr. Gregg agreed. Dr. Erickson, the Respondent's expert, did not rely on the nerve damage or structural stability of Mr. Barta's spine in arriving at his conclusions but rather on Mr. Barta's left foot.

The record contains the testimony of four physicians. Each offered his conclusion on the ultimate question of whether or not Mr. Barta could perform the duties of a Correctional Officer. Hennepin County's examining physician, Dr. MacCornack believed that Mr. Barta should not be exposed to physical violence due to his past injuries. He concluded that Mr. Barta was less maneuverable than a normal individual and would be at a disadvantage at defending himself. Although the record does not indicate whether or not Dr. MacCornack himself visited the Correctional Facility on any occasion, he has been doing physical examinations for Hennepin County for at least 10 years. He also had the benefit of discussions with Mr. Skavnak concerning the nature of the Correctional Officer position. Dr. MacCornack's examination was fairly short, however, and his knowledge of Mr. Barta's injuries mainly relied upon the information supplied him by Mr. Barta. He examined no x-rays in order to determine the stability of the spine and administered no tests of physical agility or maneuverability to Mr. Barta.

Dr. Cabanella is a Mayo Clinic orthopedic surgeon who treated Mr. Barta following his 1982 automobile accident. Dr. Cabanella's testimony in this proceeding is given great weight both because of his expertise and his

relatively disinterested position vis a vis this litigation. Additionally, the Respondent admits that Dr. Cabanella is "clearly a gifted and sincere professional." (Respondent's brief, p. 31). In his opinion there is no medical basis for restricting Mr. Barta from being a Correctional Officer. He states that Mr. Barta's range of motion in his cervical and thoracic spine is for all practical purposes normal. He concluded that Mr. Barta was at no increased risk of injury due to his past spinal injury,, that is, he has the same likelihood of injury as anyone else. He stated that Mr. Barta can break a fall and roll normally and can walk and stand for 8 hours per day this testimony, which was corroborated by Dr. Gregg, is specifically credited over that of Dr. MacCornack. Dr. Cabanella did agree that Mr. Barta i s not as agile or as fast on his feet as a person without his condition. Dr. Cabanella was not familiar with the specific job duties of a Correctional Officer at ACF but speculated that Mr. Barta might not be able to run fast enough. Dr. Cabanella did offer the "common sense" opinion that Mr. Barta would be "tempting fate" by taking a job such as that of Correctional Officer. The record seems clear, however, that this comment was not offered from the viewpoint of Dr. Cabanella's medical expertise but rather as a general observation which might be offered by a layman.

Dr. Gregg, who practices occupational medicine at the St. Paul Ramsey Medical Center, performed an extensive examination upon Mr. Barta at the request of the Complainant. Based upon that examination, his consultation with Dr. Cabanella, and a review of the data he collected concerning the Correctional Officer position, he concluded that there is a negligible probability of injury to Mr. Barta or his co-employees if he becomes a Correctional Officer. He states that Mr. Barta would have no trouble planting his left foot in order to use his upper body and generate force and that he is able to wrestle and take down another person. Dr. Gregg states that although

Mr. Barta i s not normal in running, he is able to navigate stairs and is mobile enough to arrive at a location in an adequate time.

Finally, Dr. Erickson who is Board-certified in internal and occupational medicine reviewed the medical reports, prehearing depositions and visited the Facility. He concluded that Mr. Barta is at a greater risk of injury since he is not as maneuverable and his muscle strength and ability to respond are in question. He stated that the left foot is the primary reason for a restriction because Mr. Barta has difficulty lifting the foot, turning it in and out and pushing down.

The ultimate issue in regard to the serious threat defense is whether or not Hennepin County, based upon this record, has demonstrated that Mr. Barta would pose a serious threat to the health or safety of himself or others at the Facility. -This includes showing that there is a reasonable probability of the threat occurring. It is concluded that the Respondent has not sustained its burden of proof in this regard. The evidence in the record preponderates in favor of a conclusion that there is no threat to Mr. Barta because he might re-injure his back due to exposure to physical violence. This was Dr. MacCornack's and Mr. Skavnak's original concern as expressed in the medical report and correspondence.

Neither however has the Respondent carried its burden of showing that the Charging Party cannot defend himself or that other employees or inmates are at

risk because of Mr. Barta's disability. There is no dispute that Mr. Barta is not as maneuverable and cannot run as fast as he could prior to his injury. Essentially, however, Hennepin County relies upon the rather large inference made by Dr. MacCornack that these limitations mean that he cannot defend himself or respond within an adequate period of time to a call for help After an extensive examination Dr. Gregg came to the opposite conclusion. What is missing from the record is any testing of Mr. Barta to determine how rapidly he can navigate conventional or spiral stairways, whether he can defend himself, or how fast he can run to respond to a call for help. It would seem reasonable for an employer to conduct such testing where a disabled applicant is not obviously disqualified from performing a job, rather than relying upon an educated estimate by a physician which requires a large inference to be made. Respondent's expert, Dr. Erickson, agreed that a demonstration of abilities would be helpful information to have. The state of the present record demonstrates that the Charging Party is somewhat slower and somewhat less maneuverable. However, undoubtedly some of the guards at the Correctional Facility are slower than others due to age, weight, or whether or not they smoke. They would not necessarily be a serious threat to the safety of their colleagues.

Hennepin County has not demonstrated that there is a reasonably probable risk of serious harm if Mr. Barta is hired. The County argues that it is virtually a certainty that Mr. Barta will be exposed to physical violence. While he will undoubtedly be involved in physical contact, the record indicates that such contact seldom results in serious injuries to Correctional officers. accordingly, the possible severity of the consequences does not appear to be of the magnitude described in Remmele, supra. Furthermore, the actual number of violent incidents at ACF appears to be relatively low even though the possibility is always present. (Findings of Fact No. 41). Therefore, the likelihood of an occurrence of a problem is minimized.

Each disability case must be examined on an individual basis. The degree of Mr. Barta's disability, his current condition and the nature of the Correctional Officer position do not present a serious threat similar to the epileptic cases relied upon by the Respondent. As the Court noted in Pearson Co., supra, it is clear that a seizure would cause an injury if the person is working with hazardous machinery. In this case the risk of serious harm has not been shown to be reasonably probable but merely possible. This is not to mininize Hennepin County's legitimate concern that the safety of fellow Correctional Officers or of inmates who need assistance might be compromised if an officer cannot adequately respond. It cannot be concluded, however, based upon this record that the employer has proved a serious threat to their health or safety." The essence of the Minnesota Human Rights Act is to ensure that employers judge applicants based upon their individual talents and abilities rather than upon stereotypes associated with their race, religion, sex or physical handicaps. In this case Hennepin County assumed that Mr. Barta could not perform certain job duties due to his past injuries and the residuals of those injuries. It should have tested the Charging Party to determine his actual individual ability.

2the record does indicate that there are certain Correctional Officer duty stations which the officer may not leave to respond to an emergency call. If the Charging Party is not able to respond in a sufficient time these posts might be appropriate for him.

The BFOQ Defense.

The Respondent has also asserted the statutory defense of the bona fide occupational qualification (BFOQ) exception to the prohibition against employment discrimination. In Remmele Engineer!ng, supra, the Minnesota Supreme Court adopted the analysis contained in Weeks v. Southern Bell Telephone & Telegraph Company, 408 F.2d 228 (5th.Cir. 1969). The Court held that an employer, in order to rely on an BFOQ exception, must present a factual basis to establish that all or substantially all persons not meeting the qualification would be unable to perform safely and efficiently the duties of the job involved. 314 N.W.2d at 3. See also. Metropolitan Transit Commission, supra, 320 N.W.2d at 430.

In its post-hearing brief (p. 40) the Respondent describes the job qualification which Mr. Barta does not meet as follows:

> The abilities to run quickly over a great distance in response to calls for assistance, to quickly negotiate multiple flights of stairs and ladders, to do these things while wearing a self-contained air unit or carrying heavy emergency equipment, to physically wrestle, subdue or take down a physically aggressive -inmate, are all bona fide occupational qualifications.

The Respondent's attempt to establish a BFOQ defense is not aided by the fact that these qualifications were not specifically listed either in a job announcement or the job description for the position of Correctional Officer. The job description does require officers to maintain order and discipline and place inmates in restraining devices and maintain the safety and well-being of residents. (Findings of Fact No. 29). However, no specific requirements are set out relating to foot speed or climbing ability. This situation is contrasted with a BFOQ case such as Metropolitan Transit Commission, supra,

where a specific rule requiring 20/40 or better vision in each eye was challenged. 320 N.W.2d at 431. Where a job qualificaticm is specifically set out in writing, it is more likely that it is an essential element of the position.

The Complainant points out that what the Respondent has failed to establish is that the Charging Party was actually unable to perform any of the asserted job qualifications. Neither has the employer shown that it would be impractical or impossible to individually test applicants with disabilities to see which could safely perform the job. Usery v. Tamiami Trail Tours, 571 F.2d 224, 235-236 (5th.Cir. 1976). Mr. Barta was not asked to negotiate stairways with or without emergency equipment, was not asked to run nor to demonstrate his physical fitness in any way that would measure his ability to perform any of these activities. It is also true that the employer does not require any of its applicants for Correctional Officer to take any sort of test relating to physical ability apart from the standard medical examination. This would seem to indicate that such ability may not be as crucial as Respondent suggests. The County argues however, that the conclusions by Dr. MacCornack and Mr. Skavnak as to Mr. Barta's ability to serve as a Correctional Officer suffices to show that he is not able to perform the job duties. It is concluded, however, that their "prediction"

does not constitute an adequate factual basis to show that Mr. Barta cannot perform those activities. Unfounded assumptions about what a protected class member can do are insufficient to support a BFOQ. Weeks, supra, 408 F.2d at 235-236

The Respondent suggests that this case is similar to State v. Sports and Health Club, Inc., 365 N.W.2d 799 (Minn.App. 1985). In that case the court found that the ability to perform exercises and lead exercise classes was a bona fide occupational qualification for the. job of full-time receptionist. The applicant in that case wore a steel brace on his lower left leg and foot because of cerebral palsy. The court affirmed the Administrative Law Judge's determination that disability discrimination was not proven because the ability-to perform exercises and lead exercise classes was a BFOQ. The facts of that case distinguish it from the case at bar since the record makes it plain that the applicant's physical condition and steel brace clearly precluded performance of an essential job duty, namely leading an exercise c l a s s .

Furthermore, Respondent does not appear to have satisfied the criteria set out in Remmele Engineering, supra. It must produce evidence in the record, that is, it must supply a factual basis to show that a person with Mr. Barta's disability cannot safely and efficiently perform the responsibilities of the employment position. 314 N.W.2d at 3. In Remmele the court held that no evidence was introduced to show that epileptics as a class could not perform the job of machinist. Neither was such a showing accomplished in this case. Although Dr. MacCornack and Dr. Erickson both concluded that Mr. Barta's restrictions were incompatible with the job, the unanswered question is how fast one has to be able to run or how fast one has to be able to navigate stairways in order to be a Correctional Officer. The Respondent has not provided an adequate factual basis in that regard nor has it ascertained the Charging Party's abilities in that regard.

Damages.

Since liability has been established the matter of damages must be considered. Minn. Stat. 363.071, subd. 2 deals with the award of damages:

> Subd. 2. Determination of discriminatory practice. The hearing examiner shall make findings of fact and conclusions of law, and if the hearing examiner finds that the respondent has engaged in an unfair discriminatory practice, the hearing examiner shall issue an order directing the respondent to cease and desist from the unfair discriminatory practice found to exist and to take such affirmative action as in the judgment of the examiner will effectuate the purposes of this chapter. Such order shall be a final decision of the department. The examiner shall order any respondent found to be in violation of any provision of section 363.03 to pay a civil penalty to the state. This penalty is in addition to compensatory and punitive damages to be paid to an aggrieved party. The hearing examiner shall determine the amount of the civil

penalty to be paid, taking into account the seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the respondent. Any penalties imposed under this provision shall be paid into the general fund of the state. In all cases where the examiner finds that the respondent has engaged in an unfair discriminatory practice the examiner shall order the respondent to pay an aggrieved party, who has suffered discrimination, compensatory damages in an amount up to three times the actual damages sustained. In all cases, the examiner may also order the respondent to pay an aggrieved party, who has suffered discrimination, damages for mental anguish or suffering and reasonable attorney's fees, in addition to punitive damages in an amount not more than $6,000. Punitive damages shall be awarded pursuant to section 549.20. In any case where a political subdivision is a respondent the total of punitive damages awarded an aggrieved party may not exceed $6,000 and in that case if there are two or more respondents the punitive damages may be apportioned among them. Punitive damages may only be assessed against a political Subdivision in its capacity as a corporate entity and no regular or ex officio member of a governing body of a political subdivision shall be personally liable for payment of punitive damages pursuant to this subdivision. . . .

The Charging Party seeks an award of back pay with interest as compensatory damages. The Minnesota Supreme Court has stated that the general

purpose of the Minnesota Human Rights Act is to ''place individuals discriminated against in the same position they would have been in had no discrimination occurred.- Brotherhood of Railway and Steamship Clerks v. Balfour, 303 Minn. 178, 195, 229 N.W.2d 3, 13 (1975) There i s a strong presumption in favor of an award of back pay to victims of employment discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The position offered to Mr. Barta prior to his medical examination was a temporary full-time Correctional Officer position which had a maximum term of six months. He was to work 40 hours per week at $9.06 per hour. Had Mr. Barta worked six full months in the position, he would have earned $9,422.40. The Respondent argued in its post-hearing brief that the actual term of employment would have been 2 months in order to fill a gap created by a resignation and promotion. However, when Mr. Skavnak offered the position to Mr. Barta he mentioned working for a term of six months. Additionally, uncertainties in determining what an employee would have earned but for discrimination should be resolved against the discriminating employer. Pettway in American Cast Iron Pipe Co.., 494 F.2d 211, 260-261 (5th.Cir. 1974). The record indicates (Findings of Fact No. 3-5) that during the six month period from January to July of 1985, Mr. Barta actually earned $3,249.33. Therefore, the back pay to which Mr. Barta would be entitled for the six-month period would amount to $6,173.07. In this case the Complainant has not asked that compensatory damages be doubled or trebled as is permitted by Minn. Stat. 363.071, subd. 2.

The Complainant argues however that the back pay award to Mr. Barta ought to be based upon the employment record of Michael Conery, the employee hired in his place, rather than simply upon the six-month temporary period of employment. Mr. Conery began work as a temporary full-time Correctional officer on January 7, 1985. On April 14, 1985 he was hired as a permanent full-time Correctional Officer and his salary was increased. He has continued as a permanent full-time Correctional Officer since that date with two more salary increases.

When Mr. Conery was hired as a permanent employee in March of 1985, Mr. Skavnak interviewed six men for the position. Mr. Barta's name was removed from the certification list when he was denied employment. If Mr. Barta's name had remained on the list he would have ranked with these six people and would have been eligible for an interview. (Findings of Fact Nos. 45, 46). The Complainant then argues that the County would logically have Picked Mr. Barta over Mr. Conery because Mr. Skavnak had done exactly that earlier in interviewing and selecting the temporary full-time Correctional Officer. Mr. Skavnak had interviewed Mr. Conery before offering the position on a conditional basis to Mr. Barta.

The employer argues that any damages related to a full-time position as Correctional officer are entirely speculative. It points out that there were a number of factors considered in hiring either Mr. Barta or Mr. Conery including the fact that Mr. Barta was immediately available since he was unemployed. Immediate availability can be an important factor in filing a temporary position. The County also suggests that Mr. Conery was better qualified in that he was working at the Juvenile Justice Center, a sister institution and had a degree in law enforcement. Additionally, the Respondent points out that working as a temporary employee does not automatically enhance the chances of a candidate for permanent employment. If a temporary's performance is good it will help, but if not, it can be an adverse factor.

If Complainant's argument prevails, Mr. Barta would receive approximately an additional $5,769.00 in back pay. However, assuming that Mr. Barta would have been hired as a full-time permanent employee is simply too speculative to support an award of damages. While it is appropriate to consider promotion in calculating a back pay damage award, there is no promotion from a temporary position to a permanent full-time position. Even in the case of a promotion situation, the courts have declined to consider it in a back pay award where the promotion was simply too speculative. Grindstaff v. Burger King, 494 F.Supp. 622, 625 (E.D.Tenn. 1980); Taylor v. Teletype Corp., 478 F.Supp. 1227, 1229 (E.D.Ark. 1979). As a practical matter Mr. Barta's performance as a temporary employee would likely have been the determining factor in whether he was hired as a permanent employee in March of 1985. The fact that he had competitive education and training for the position and the fact that Mr. Skavnak picked him over Mr. Conery on a prior occasion when he was immediately available do not suffice to permit a conclusion that he would have been hired for the permanent position. Damages based on a permanent full-time position would not place him in the same position he would have been absent the discrimination. He would have had to have demonstrated competent performance during service as a temporary Correctional Officer in order to gain a full-time position.

Prejudgment interest is commonly included with back pay awards in Human Rights cases. The minimum rate utilized is 6% per annum. 2 Larson, Employment Discrimination 55.37(b)(iii). Spurck v. Civil Service Board, 231 Minn. 183, 42 N.W.2d 720, 728 (1950); Washington v. Kroger Co., 671 F.2d 1072, 1078 29 F.E.P. 1739 (8th.Cir. 1982). Behlar v. Smith, 719 F.2d 950, 954, 33 F.E.P. 92, 95 (8th.Cir. 1983). Interest on a back pay award places the Charging Party in the position he would have been absent discrimination by compensating him for the loss of use of money. Recently, the Minnesota Court of Appeals expressed its preference for calculating prejudgment interest on back pay awards by an administrative agency by reference to Minn. Stat. 334.01, subd. 1 which provides for interest at the rate of 6% per annum. Henry v. Metropolitan Waste Control Commission, 401 N.W.2d 401 , 407 (Minn.App. 1987). Interest at the rate of 6% per annum from the end of -the six-month temporary period of employment on July 10, 1985 to the date of this Order amounts to $783.38.

Additionally, Mr. Barta incurred certain medical expenses in the course of attempting to change Hennepin County's mind about the refusal to hire him. In connection with his January 10, 1985 examination by Dr. Cabanella at the Mayo Clinic, he incurred expenses of $140.50 for examination and consultation, $249.20 for x-rays and $9.75 for urology service, for a total of $399.45. (Findings of Fact No. 19). Since these expenses were incurred due to the discrimination, they are properly compensable to put Mr. Barta in the same position he would have been in had no discrimination occurred. Brotherhood of Railway & Steamship Clerks, supra, 229 N.W.2d at 13.

The statute also permits an award to an aggrieved party of damages for mental anguish or suffering and reasonable attorneys fees. Anderson v. Hunter Keith, Marshall & Co., 401 N.W.2d 75, 83 (Minn.App. 1987); State v. Porter Farms, Inc., 382 N.W.2d 543, 551 (Minn.App. 1986). In this case the Attorney

General represented the Charging Party subsequent to the issuance of a Complaint in this matter. However, Mr. Barta initially consulted a private attorney after he was rejected for the Correctional Officer position. Mr. Barta met twice with attorney, Michael Klampe, and My-. Klammpe wrote a letter on Mr. Barta's behalf to Hennepin County. (Finding of Fact Nos. 19, 22). Mr. Klampe then referred Mr. Barta to the Department of Human Rights for the filing of a Complaint. Mr. Barta paid Mr. Klampe $149.00 for his services. This sum is properly compensable since it is directly related to the Charging Party's discrimination claim and would not have been incurred absent the discrimination.

The Complainant has also argued in favor of an award of damages for mental anguish and suffering. One court has described damages for mental distress and anguish as "compensation for shame, mortification, mental pain and anxiety, . . . and for annoyance, discomfiture, and humiliation Veselenak v. Smith, 414 Mich. 567, 327 N.W.2d 261, 264 (1982). Black's Law Dictionary (Rev. 4th Ed. 1968) describes mental anguish as "feelings of distress, fright, and anxiety" and "mental suffering resulting from the excitation of the more poignant and painful emotions, such as grief, severe disappointment, indignation, wounded pride, shame, public humiliation, despair, etc." Factors to be considered in awarding damages for mental anguish and suffering include the Charging Party's particular vulnerability to emotional harm, whether or not the embarrassment was public as opposed to

private and whether the discrimination was rude rather than polite. Gray v. Serruto Builders, Inc., 110 N.J.Super. 297, 265 A.2d 404, 415-416 (1970);
Lykken v. Vavrack, 366 F.Supp. 585, 596 (D.Minn. 1973).

In this case the Charging Party incurred potentially life-devastating injuries in an automobile accident in 1982. At the time that he applied for the Correctional Officer position with the Respondent, he had made a rather spectacular recovery from his accident and believed that it was behind him as he attempted to pursue a position in his chosen profession. The rejection caused him to believe that he would never obtain employment in his chosen field because he could not obtain an entry level position. It also caused a strain on his marriage because his wife desired to live in the Twin Cities and because he was not fully employed at the time. Although Mr. Barta believes that the job rejection contributed to the demise of his marriage, other factors were also involved in his divorce. Mr. Barta was, however, faced with the public humiliation of having to tell his friends and family that he had been rejected for employment after having been tentatively accepted and then had to relate to them the basis for the rejection. Because he was unemployed and because his wife desired to move to the Twin Cities, Mr. Barta was more vulnerable to the distress caused by the Respondent's refusal to hire him.
The record contains sufficient facts to conclude that Mr. Barta experienced distress, anxiety, and disappointment. The mental anguish experienced by Mr. Barta is not so severe as to support' a large damage award. However, based upon the facts in this record the Charging Party is properly compensated or made whole for his mental anguish and suffering in the amount of $2,500.00.

The Complainant further asserts that an award of punitive damages is appropriate in this case. The statute permits punitive damages to be awarded in an amount not more than $6,000.00 and requires them to be awarded pursuant to Minn. Stat. 549.20. That statute permits punitive damages only upon

"clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others." The statute also sets out factors to be considered including the seriousness of the hazard to the public, profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant. The Complainant focuses upon the County's response to Mr. Barta's request that it more closely examine his medical history and physical condition. It is argued that the County should have pursued more thoroughly an examination of the Defendant's condition, such as for example obtaining a second opinion from a neutral doctor.

It is concluded that the record in this case does not support an award of punitive damages since it does not contain clear and convincing evidence that the Defendant was willfully indifferent to Mr. Barta's rights. The County did forward Dr. Cabanella's opinion to Dr. MacCornack for his consideration. While more should have been done to gather further information about what Mr. Barta could or could not do, the record indicates that Mr. Skavnak and Dr. MacCornack believed that Mr. Barta would be unable to perform the duties of Correctional Officer. This is not at situation where the employer recognized

the civil rights of the Charging Party but simply chose 'to ignore them. Since the employer's actions do not amount to evidence of willful indifference and in light of the other damages awarded, an award of punitive damages is not appropriate.

Finally, Minn. Stat. Sec. 363.071, subd. 2 requires the Administrative Law Judge to order any respondent found to be in violation of Chapter 363 to pay a civil penalty to the state. The statute sets out guidelines to be considered including the - seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the respondent. the penalty is laid into the general fund of the state. In this case the financial resources of the Respondent would not preclude a sizable civil penalty. the question of whether or not the violation was intentional is not so clear since while it is true that the County refused to hire Mr. Barta because of his disability, the record indicates the County believed that it had a defense to a discrimination claim, namely that Mr. Barta could not safely perform the job duties. Public harm was occasioned by the violation since such actions discourage people with disabilities from seeking employment in challenging positions even those within their field. Finally, the violation is serious since it unnecessarily discouraged the Charging Party in the pursuit of hi s chosen career and caused him the distress involved in being labeled unsuitable "or a position without being adequately tested for it. On the other hand, the violation involved only Mr. Barta, rather than a class of people, and was not an egregious example of discrimination since it involved a dispute a!; to whether Mr. Barta could perform certain functions such as running and climbing stairs. Taking into consideration all of these factors, a civil penalty in the amount of $3,000.00 is appropriate.

G.A.B.